Supreme Court, U. S.
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NO. 80-318

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

EXXON CORPORATION, ET AL.

Appellants

-vs-

CITY OF MENTOR, OHIO

Appellee

ON APPEAL FROM
THE OHIO COURT OF APPEALS
FOR THE ELEVENTH DISTRICT

JURISDICTIONAL STATEMENT

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Appellants

-vs-

CITY OF MENTOR, OHIO

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FOR THE ELEVENTH DISTRICT

JURISDICTIONAL STATEMENT

QUESTION PRESENTED

Whether or not, consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution, a state may enact a zoning restriction which prohibits a property owner from making any economic use of his property without compensating him for

the loss of the use of his property and also deny him the judicial remedy of having such restriction declared invalid as a taking of property without just compensation.

PARTIES TO THE PROCEEDINGS IN THE OHIO COURT OF APPEALS, ELEVENTH DISTRICT

1. Exxon Corporation, a New Jersey Corporation
2. Robert J. Amsdell
3. City of Mentor, Ohio

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OPINIONS BELOW

The opinion of the Ohio Court of Appeals for the Eleventh Appellate District is not reported. The opinion is reprinted in the Appendix at page A-5. The opinion of the Ohio Court of Common Pleas for Lake County is not reported. The opinion is reprinted in the Appendix at page A-13.

BASIS OF JURISDICTION

This is an appeal from the judgment of the Ohio Court of Appeals, Eleventh District, affirming the judgment of the Court of Common Pleas, Lake County, Ohio. The judgment of the Court of Appeals was entered on December 26, 1979. See Appendix p. A-3. Appellants properly sought review of the Court of Appeals judgment in the Supreme Court of Ohio. On May 1, 1980, the Supreme Court of Ohio refused to exercise its discretionary

jurisdiction to review the Court of Appeals judgment. See Appendix p. A-35.

A notice of appeal to this Court was duly filed in the Ohio Court of Appeals, Eleventh District on July 15, 1980. See Appendix p. A-39.

The judgment of the Ohio Court of Appeals upheld the constitutional validity of a City of Mentor ordinance against a claim that the ordinance as applied to Appellants' real property violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES

Fourteenth Amendment, United States Constitution, Section One:

> All persons born or naturalized in the United States,

and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 150.012 of the Codified Ordinances of The City of Mentor, Ohio:

§ 150.012 Single family district.

In the single family residence district, any lot, piece or parcel of land may be used only for the following:

Single family residence, together with the outbuildings customary to such use located on the same lot, piece or parcel of land including:

(1) A private garage of capacity not to exceed 3 passenger automobiles.

(2) A children's playhouse.

(3) Buildings for the housing of permitted domestic animals.

(4) A greenhouse, the products of which are used only for the persons living on the premises on which the same is located.

(5) Garden tool house.

(6) Hobby shop, not used commercially.

(7) Swimming pools. (Ordinance 71-0-70, 6/21/71)

(8) Fences

STATEMENT OF THE CASE

The Appellant Robert J. Amsdell is the owner of a parcel of property located on the northwest quadrant of the intersection of State Route 2 (the Lakeland Freeway) and State Route 306 in the City of Mentor, Ohio. The Appellant Exxon Corporation has entered into an option with Robert J. Amsdell to purchase the property and wishes to construct an automobile service facility on the property. The property is zoned for single-family residential development.

The property consists of a little more than one acre of land. The eastern boundary of the property abuts S.R. 306 for a distance of 274.12 feet beginning at an ingress and egress ramp for the Lakeland Freeway on the parcel's southern boundary and extending north. The southern boundary of the property abuts the Freeway interchange ramp itself. The western and northern boundaries of the property abut undeveloped real estate which is not owned by either of the Appellants.

In front of the property, S.R. 306 is a three-lane highway. At the northern end of the property, S.R. 306 consists of only two two lanes but widens to three lanes as the road runs along the front of the property and slopes upward to meet the freeway overpass bridge at the southern end of the property.

Daily, some 23,700 automobiles pass by the property on State Route 306 and an additional 40,000 automobiles pass by

the property on the freeway. Of the four quadrants of the intersection of S.R. 306 and the Lakeland Freeway, the subject parcel is burdened with the greatest amount of traffic because it is located contiguous to the double on-off ramp for the freeway.

The property was once part of a larger tract of land that was zoned for residential use prior to construction of the Lakeland Freeway. When the freeway was built, the State took part of this land to construct the freeway and the on-off ramp which allows traffic to enter and exit the freeway from S.R. 306.

Despite this radical change in the character of the land, the City of Mentor refused to change the parcel's zoning and left it and the surrounding property north of the freeway zoned single-

family residential. All of the property surrounding the subject parcel and in close proximity of the freeway has remained undeveloped for many years and there is no indication that it will or can be developed in the near future for residential use. None of this surrounding property is owned by Mr. Amsdell or Exxon. The land on the interchange's southwest and southeast quadrants, however, has been zoned for interchange use, a use which allows development of the property for a service station.

At the trial of the case in the Common Pleas Court, it was established that the subject parcel is simply not suited for single-family residential use. The evidence established that single family residential development of the parcel was not marketable and that the

dominating influence of the freeway on the parcel would have an immediate depreciating effect on any residential construction, resulting in a market value for the property after construction that would not even be sufficient to allow the developer to recover his costs. It was testified to by experts in land use that only an incredibly stupid developer would even attempt to develop that property as single-family residential.

While the City of Mentor presented witnesses who testified that a single-family residence could be physically placed on the parcel, they admitted that such construction would require multiple zoning variances from the City and could not be profit-motivated. In fact, one City witness admitted that in his plan for the development

of the area he envisioned the Appellants' parcel as remaining fallow for the benefit of the surrounding property.

HOW THE FEDERAL QUESTIONS ARE PRESENTED

The questions presented for review were first raised by the Appellants when they filed their Complaint requesting a declaratory judgment that the City of Mentor zoning ordinance which restricted development of their property to single-family residential use be declared unconstitutional as applied to their parcel of land and requesting permission to use the parcel for an automobile service facility.

The City of Mentor sought to justify its zoning restrictions on Appellants' property because the restrictions conformed with the City's master plan for the general development of the area.

The Trial Court noted the oppressive economic impact of the zoning on the value of Appellants' land:

> Without doing an analysis of the competing opinions on the most advisable use of the property, the only point of agreement was that the property owner could realize from $100,000 to $150,000 from the sale of his property to Exxon for a gas station, as against $5,000 to $17,000 for use as permitted by the present zoning. See Appendix p. A-22.

As noted above, the Appellants presented expert testimony that, while a single-family residence could physically be built on the property, the property could not be economically used for single-family residential development. The value of the property as presently

zoned is a speculative value based on the hope that the zoning might some day be changed to allow some economic use of the property. (See App. p. A-20)

Faced with the evidence that Appellants' rpoperty could not be economically developed for single-family use and that as presently zoned the value of the property was limited to speculation, the Trial Court upheld the ordinance because it found that it was an implementation of the City's master plan and the master plan was not unreasonable or arbitrary. The Court stated in its Opinion:

> The City of Mentor adopted a plan for the future development of the City. . . and such plan does not seem to be arbitrary or confiscatory. App. p. A-32.

The Court upheld the ordinance because it found that the communal benefit from the master plan justified any

economic loss imposed on Appellants even if as in this case the master plan when applied to a particular parcel of property denied the property owner all economic use of his property. Neither the Trial Court nor the Appellate Court found that the ordinance in question when applied to Appellants' parcel of property allowed the Appellants any economic use of their property.

The Trial Court upheld this economically oppressive zoning even though it found that the Appellants' proposed use of the property was appropriate and would not harm the surrounding community.

> Some disadvantages to having a gas station in a residential area were described, such as the lights, noise, rapid run off of water, but these are minor to the idea of holding the line on the comprehensive zoning established by the City of Mentor. Once there is a hole in the dam, it will be

> almost impossible to prevent a flood of requested changes in zoning for other commercial projects. See Appendix p. A-26. (Emphasis Added)

On appeal Appellants again presented to the Court the contention that the Mentor ordinance was invalid because it deprived Appellants of all economic use of their property. Again, the Ohio courts held that the benefits to the community from the master plan justified depriving Appellants of all use of their property.

> Orderly development of an area is a ligitimate [sic] goal of zoning regulations and the court is justified in weighing appellants' evidence as to loss of value against the city's interest in its long range development plan. . . . Thus the city can rightfully maintain, and the trial court sustain, an objection to "spot zoning" as "a hole in the dam" that could threaten the whole development scheme. See Appendix p. A-8.

SUBSTANTIAL CONSTITUTIONAL QUESTIONS ARE PRESENTED

The decision of the Ohio Court of Appeals in this case breaks new zoning law ground. The Court has held that a zoning ordinance's compliance with a master plan automatically validates such ordinance regardless of the economic loss the ordinance imposes on an individual property owner. It raises the novel question of the ability of a city's master development plan to validate zoning legislation adopted to implement the plan even when the legislation as applied to a particular parcel of property deprives the property owner of all economic use of that property. The judgment of the Court of Appeals in this case allows the City of Mentor to require Appellants to leave their land vacant, open space for the benefit of the remaining community without requiring the

City to compensate Appellants for such communal taking of their property. Such a holding presents a serious question as to how far a community may go in requiring an individual to sacrifice use of his land for the community and the proper role of the Courts in reviewing zoning legislation.

It has long been held and is without dispute that a municipality has the power to make reasonable zoning regulations regarding the use of land within its territorial boundaries. Village of Euclid v. Ambler Co., 272 U.S. 365 (1926). This power includes the power to encourage residential development, protect the community from the ill effects of urbanization and to protect and preserve open space within a residential community. Agins v. Tiburon, 48 United States Law Week 4700 (1980); Village of Belle Terre v. Boraas, 416

U.S. 1, 9 (1974); Village of Euclid v. Ambler Co., supra.

But while the courts have always recognized a community's interest in protecting and encouraging orderly development of the real property within the community, that interest is not unlimited. The Fourteenth Amendment to the United States Constitution requires that any such regulation serve a legitimate state interest and leave the property owner some economic use of his land or the regulation will constitute a taking for which the property owner must receive just compensation. Village of Euclid v. Ambler Co., supra; Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

Although no precise rule has been formulated as to when a government regulation of property constitutes a taking, the question necessarily involves the

balancing of the private and public interests involved, Kaiser Aetna v. United States, 444 U.S. 164 (1979); Pennsylvania Coal Co. v. Mahan, 260 U.S. 393 (1922), so that in justice and fairness economic injuries caused by public action are not disproportionately concentrated on an individual property owner without compensating him for that loss. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

This Court has always held and the Constitution requires that in striking the balance between the public and private interests a zoning regulation must leave a property owner with some economic use for his property or the regulation constitutes a taking. The right to own property as guaranteed by the United States Constitution encompasses the right to use that property. United States v. General Motors Corp., 323 U.S. 373, 377

(1945). When a zoning regulation extinguishes a fundamental attribute of property ownership or makes the property wholly useless, the right of property prevails over public interest and the property owner is entitled to compensation for the taking or the regulation is invalid under the Due Process Clause of the Fourteenth Amendment. Kaiser Aetna v. U.S., supra; Pennsylvania Coal Co. v. Mahon, supra; Armstrong v. United States, 364 U.S. 40 (1960); Penn Central Transportation Co. v. New York City, supra.

The ordinance in question restricts Appellants' property to single-family residential use. The evidence established that while it was physically possible to place a single-family residence on the property, such use of the property was economically unfeasible. If the property

was developed for residential use, as a result of the depreciating effect of the proximity of the highway, a sale of the property immediately after the development would result in a return to the property owner of less than the cost of developing the property. Thus, the effect of the ordinance is to require the property owner to suffer an economic loss if he wishes to use his property.

The Ohio Courts did not find otherwise, but justified this taking on the basis that the ordinance implemented the community's master plan for development. The effect of the Ohio Courts' ruling is that the Appellants may not use their property but must maintain it as vacant, open space to encourage residential development of surrounding property for the benefit of the community. Such a requirement that property be devoted to a public use

has traditionally been viewed as a taking of property for public use requiring compensation to the property owner. In the instant matter, however, Appellants have not been compensated for the taking of their property.

As Justice Holmes noted in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), a strong public benefit is not enough to justify a police regulation that deprives a property owner of the use of his property without compensation.

> When it reaches a certain magnitude, . . . there must be an exercise of eminent domain and compensation to sustain the act. . . .
>
> . . . .
>
> [T]he natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

> The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by shorter cut than the constitutional way of paying for the change. 260 U.S. at 413-15.

The rationale adopted by the Ohio Courts raises serious questions of constitutional validity. For what good is the right to own property as protected by the United States Constitution if indeed that ownership carries with it no corresponding right to use the property? The constitutional prohibition against taking property without just compensation was enacted to insure that if private property was to be taken to benefit the public as a whole, the private property owner would be compensated for that taking. Armstrong v. United States, supra.

The rationale applied by the Ohio Courts in this case, however, completely subverts that principle by holding that a sufficient public benefit may justify a city in prohibiting a property owner from making any economic or beneficial use of his property without paying the property owner for that taking. Indeed, under the Ohio Court's ruling, the City of Mentor is much better off than if it pursued eminent domain proceedings to take the property for it not only does not have to pay the property owner for the taking but it also may require the property owner to hold legal title to the property and to continue paying taxes on the property. Such a position seems untenable in light of the Constitution and past decisions by this Court, yet it has been embraced by the Ohio Courts in this case.

This case is different in character

from past cases in which requirements of open space and restriction of property to residential development have been upheld by this Court. See Village of Belle Terre v. Boraas, supra; Agins v. Tiburon, supra. In those cases the property owner was not deprived of all economic use of his property and only a portion of his property was left as open space.

The rule adopted by the Ohio Courts in this case has converted private ownership of property into communal ownership of property and raises serious questions about the continued validity of the right to own property in Ohio. This rule violates the Due Process Clause of the United States Constitution and should be reviewed by this Court.

The result reached by the Ohio Courts might not be so serious if it were a

single isolated incident. It is not, however, a single isolated incident. Courts in other states have also circumvented the Due Process Clause to allow a public taking of private property without compensation by holding that a sufficiently important public benefit justifies police regulations that prohibit all economic use of one's property. Kraiser v. Zoning Hearing Bd., 406 A 2d 577 (Pa. Commw. Ct., 1979). See generally "Land Use Implications of Wetland and Flood Plain Regulation," Zoning and Planning Law Report, Vol. 2, No. 13, Dec., 1979, Clark Boardman Co. Ltd.

Furthermore, in arriving at their decision, the Ohio Courts did not simply misapply traditional rules of law but completely discarded its traditional role in examining the constitutional

validity of a zoning ordinance as applied to a particular parcel of land--a role set out by this very Court. In 1926 this Court in Euclid v. Ambler Co., supra, stated that even though a zoning ordinance was valid on its face, it might when applied to a particular parcel of property be so oppressive as to render the ordinance void as to that particular parcel. Since the Euclid case, the courts have faithfully guarded individual property rights by not only determining if zoning ordinances are reasonable in general but also determining if the ordinance is reasonable when applied to a particular parcel of property. In the present case, however, the Ohio Courts ignored their role of protecting the individual property owner from unreasonably oppressive zoning regulations and refused to review the

ordinance in light of its impact on Appellants' particular parcel of property. The Ohio Courts after finding the ordinance valid on its face as a reasonable implementation of the City of Mentor's Master Plan to preserve the surrounding area for residential development, ignored the evidence that the ordinance rendered Appellants' property useless and refused to consider the ordinance's harsh economic impact on Appellants' particular parcel of property.

This Court should take this opportunity to re-instruct the lower Courts on their proper role in protecting individuals from oppressive zoning legislation and to put an end to the current trend of allowing public entities to benefit the general public by prohibiting an individual property owner from using his

property and yet not compensating that individual for the tremendous economic loss he must suffer.

It is of course true that on occasion the needs of the community require and justify the taking of private property for community purposes. If the benefit to the Mentor community of encouraging surrounding property to be developed residentially is sufficiently great to require that Appellants' parcel be left vacant for open space purposes then the City of Mentor should be required to compensate the Appellants for the appropriation of their property to a public use. The Ohio Courts, however, upheld the ordinance without requiring the City to pay compensation to the Appellants. Apparently the Courts felt that because of the public benefit from the ordinance, the Appellants could not

have the ordinance declared unconstitutional. Thus, the Appellants' only remedy is an action in inverse condemnation for an award of damages to compensate them for the taking.

Such a rule is the exact opposite of a rule which this Court has already accepted for review in San Diego Gas & Electric Co. v. City of San Diego, No. 79-678, 48 U.S. Law Week 3814. In the San Diego case, the California Court held that where a zoning regulation so restricted the property owner's real estate as to deny the property owner any beneficial use of his property, he could not bring an action for damages but was relegated to bringing a declaratory judgment action to invalidate the zoning ordinance. In the instant case, the Ohio Courts have taken the exact opposite approach. The Ohio Courts have in effect

held that where a zoning ordinance that denies a property owner any economic or beneficial use of his property has a sufficient public benefit to justify its continued enforcement the property owner may not bring a declaratory judgment action to invalidate the ordinance, as done in the instant case but is relegated to an action for damages for the taking.

CONCLUSION

This appeal raises serious questions as to the continued vitality in the State of Ohio of the constitutional right to own private property. The Ohio Courts have held that a sufficiently great communal benefit can justify the State in denying a private property owner any economic use of his property without compensating him for that taking. Furthermore, the Ohio Courts have taken

an approach exactly opposite of the California Courts in San Diego Gas & Electric Co. v. City of San Diego, supra, and have held that where a zoning ordinance that conforms with a master plan deprives a property owner of all economic use of his property without compensation, the property owner may not seek a declaration that the ordinance is unconstitutional. In effect, the Ohio Court has limited the property owner's remedy in such a situation to an action for damages--the remedy found improper in San Diego Gas & Electric Co. v. City of San Diego, which is now pending before this Court.

For these reasons the Court should note probable jurisdiction of this appeal to decide (1) if under the Constitution a public benefit from a zoning ordinance can justify a state in prohibiting a

property owner from all economic or beneficial use of his property without compensating him for the loss of the use of his property, (2) if a Court in reviewing the validity of a zoning ordinance as applied may if it finds that the ordinance has a beneficial effect on the community as a whole ignore the ordinance's oppressive economic impact on a particular parcel of property, and (3) if, when an ordinance results in a taking of private property without compensating the property owner, the state may deny the property owner the judicial remedy of having that ordinance declared unconstitutional.

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216-352-3375

PROOF OF SERVICE

I, David P. Freed, a member of the Bar of the Supreme Court of the United States and counsel of record for Robert J. Amsdell and Exxon Corporation, Appellants herein, hereby certify that on the 27th day of August, 1980, I served three copies of the foregoing Jurisdictional Statement on each of the parties herein as follows:

On Appellee City of Mentor, Ohio, by mail, by depositing copies of the Jurisdictional Statement in a United States post office mailbox in Cleveland, Ohio, with first class postage prepaid addressed to Daniel F. Richards, counsel

of record for Appellee, at 38052 Euclid Avenue, Willoughby, Ohio 44094; and to I. James Hackenberg, counsel of record for Appellee, at 420 Lakeshore Trust Building, Painesville, Ohio 44077.

On the State of Ohio, by mail, by depositing copies of the Jurisdictional Statement in a United States post office mailbox in Cleveland, Ohio, with first class postage prepaid addressed to William J. Brown, Attorney General for the State of Ohio, at 30 East Broad Street, 17th Floor, Columbus, Ohio 43215.

I further certify that all parties required to be served have been served.

DAVID P. FREED
Counsel for Appellants
P.O. Box 920
Painesville, Ohio 44077
216-352-3375

Dated: August 27, 1980.

A P P E N D I X

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STATE OF OHIO)
) SS.
COUNTY OF LAKE)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

EXXON CORPORATION, ET AL.,

Appellants,

- vs -

CITY OF MENTOR, OHIO,

Appellee.

FILED
COURT OF APPEALS
DEC 26 1979
MELVIN S. REED
CLERK OF COURT
LAKE COUNTY, OHIO

JUDGMENT ENTRY

CASE NO. 7-065

This cause came on to be heard upon the Record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in

this Court's Opinion, which is incorporated herein by reference.

It is ordered that appellee recover of appellant the costs herein taxed.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ Robert E. Cook
JUDGE

FOR THE COURT

COURT OF APPEALS OF OHIO,
ELEVENTH DISTRICT
COUNTY OF LAKE
COURT OF APPEALS CASE NO. 7-065

EXXON CORPORATION, ET AL.,

Plaintiff-Appellants,

- vs -

CITY OF MENTOR, OHIO,

Defendant-Appellee.

JUDGES:

HON. ALFRED E. DAHLING, P.J.
HON. EDWIN T. HOFSTETTER, J.
HON. ROBERT E. COOK. J.

O P I N I O N

DATED: December 26, 1979

FILED
COURT OF APPEALS
DEC 26 1979
MELVIN S. REED
CLERK OF COURT
LAKE COUNTY, OHIO

APPEARANCES:

For Appellee:

Atty. Daniel F. Richards
38052 Euclid Ave.
Willoughby, Ohio 44094

For Appellant:

Atty. David P. Freed and
Thomas A. Kondzer
1539 Leader Bldg.
Cleveland, Ohio 44114

Appellants have appealed a declaratory judgment of the Common Pleas Court finding the applicable sections of the zoning ordinance of the City of Mentor, Ohio constitutional.

Appellant Robert J. Amsdell owns a property at the northwest quadrant of the interchange of S.R.2 (the Lakeland Freeway) and S.R.306 in Mentor. Appellant Exxon Corporation took an option to purchase the property for construction of a service station. Appellants brought an action seeking a declaratory judgment that the existing zoning for the parcel, single family residential, is unconstitutional. The trial court found the existing zoning for the parcel is constitutional.

Appellants have appealed to this court from said judgment.

Appellants have filed five assign-

ments of error which raise two basic issues. First, was the trial court's decision contrary to the weight of the evidence in holding that the evidence did not remove from the area of fair debate the issue of the zoning plan's relationship to the health, safety, welfare and morals of the community? Second, does application of the zoning ordinance to appellant Amsdell's land deny appellants equal protection of the law?

In determining the constitutionality of a zoning ordinance, the test is whether the ordinance is reasonably related to the health, safety, welfare and morals of the community. In Ohio, that determination is made by the "fair debate" test - that is, whether the invalidity of the ordinance is "plain, apparent and beyond fair debate". See Mobil Oil Corp. v. City of Rockey River,

38 Ohio St. 2d 23; Willott v. Beachwood, 175 Ohio St. 557; State ex rel. Beerman v. Kettering, 120 Ohio App. 309.

The trial court's determination will not be overturned absent clear evidence that it abused its discretion. See Curtiss v. Cleveland, 166 Ohio St. 509; Site and Tract Real Estate Co. v. Hill, unreported decision, 11th District Court of Appeals, Lake County 4-241, dated July 9, 1973.

Here, the trial court, after reviewing the evidence, concluded that the application of the ordinance to the Amsdell property was fairly debateable and therefore constitutional.

Orderly development of an area is a ligitimate goal of zoning regulations and the court is justified in weighing the appellants' evidence as to loss of value against the city's interest in its long

range development plan. See C. Miller Chevrolet Co. v. Willoughby Hills, 38 Ohio St. 2d 928. Thus the city can rightfully maintain, and the trial court sustain, an objection to "spot zoning" as a "hole in the dam" that could threaten the whole development scheme.

As to the second issue raised by appellants, that the denial of permission for them to build a service station on their property while permission was given to others to build service stations at sites on the south side of the freeway (S.R.2) denied appellants of the equal protection of the law in violation of the 14th Amendment of the United States Constitution, it is without merit since the subject property is not similarly situated with the sites on the south side of the freeway.

The comprehensive development plan

of the City of Mentor calls for the freeway to be a buffer between commercial and residential development, the south side to be developed commercially and the north side to remain residential. So the trial court, in answering this issue, had to determine whether appellants' land was treated as other property similarly situated on the north, or residential, side of the freeway.

The assignments of error are not well taken.

Judgment affirmed.

/s/ Robert E. Cook
ROBERT E. COOK, J.

Dahling, P.J., and

Hofstetter, J. Concur

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

EXXON CORPORATION, et al.,	)
	)
Plaintiffs	)
	)
vs	)
	)
CITY OF MENTOR,	)
	)
Defendant	)

CASE NO. 77 CIV 0838

JOURNAL ENTRY OF JUDGMENT

Upon evidence and the law, the Court finds that the City of Mentor, Zoning Ordinances, as applied to plaintiffs' property and the City's refusal to issue a permit to plaintiffs to construct an automobile service station are constitutional and that plaintiffs are not entitled to a declaratory judgment or relief as prayed for in the Complaint.

Judgment is therefore rendered in favor of the defendant and against the plaintiffs upon the Complaint which is

dismissed at plaintiffs' cost.

/s/ J. Frank Pollock
JUDGE POLLOCK

APPROVED:

/s/ Daniel F. Richards
Daniel F. Richards
Attorney for Defendant
Assistant Law Director for
City of Mentor

/s/ David P. Freed
David P. Freed
Attorney for Plaintiffs

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

EXXON CORPORATION, et al)
)
Plaintiff)
)
-vs-)
)
CITY OF MENTOR, OHIO)
)
Defendant)

CASE NO. 77CIV 0838

O P I N I O N

November 9, 1978

The Plaintiff, Exxon Corporation, has entered into and has exercised an option with Plaintiff, Robert J. Amsdell, holder of record title of certain real estate described in the Complaint which is located in the northwest quadrant of the intersection of State Route 2 and Reynolds Road, also known as S.R. 306, in the City of Mentor. The Defendant City has a comprehensive zoning ordinance and the subject parcel is zoned residential (R-C) that permits a single family

home with other allied small buildings to be constructed on a lot with a minimum of 22,000 square feet. (Section 150.012 of the Zoning Ordinance)

Exxon desires to construct an automobile service facility on said property. On October 18, 1977, it filed plans and specifications with the City building department with a request for a permit. The request was refused because the present zoning would not permit the proposed construction, and with the further admonition that the recently enacted "referendum" charter provision does not permit the City Council to in and of themselves correct said zoning.

Plaintiffs say that insofar as said zoning code prohibits the erection of the proposed automobile service station, the same bears no substantial relation to the public health, safety, morals or

general welfare of the community and therefore is not a valid exercise of the municipal police power and is therefore unreasonable, invalid and violative of Plaintiffs' right to own and use private property as guaranteed by Article I of the Constitution of the State of Ohio and the Fourteenth Amendment of the Constitution of the United States of America. They pray for a declaratory judgment to the extent that said provisions apply to Plaintiffs' property and only insofar as said ordinance prohibits the erection of their proposed service station. They further ask for an order to issue requiring the Mentor Building Department to issue a permit to it according to the plans submitted.

Counsel for both parties have filed very thorough and exhaustive briefs on the facts and the law applying to their

view of the case which have been most helpful to the Court in attempting to arrive at a proper conclusion in the case.

The first consideration is to determine the exact question to be decided and several cases have been cited on the subject. The Supreme Court devoted its entire opinion in consideration of this problem as between two theories expressed, one by the trial court and the other by the Court of Appeals, and it adopted that of the trial court in the case of Mobile Oil Corp. vs. Rocky River, 38 Ohio St. 2d 23 (1974), and said at Page 41:

> "Thus the issue should be framed: 'whether the Rocky River zoning ordinance insofar as it prohibits appellee from constructing a gasoline service station on the subject parcel, has any reasonable relationship to the legitimate exercise of police power by the municipality'."

In the case of C. Miller Chevrolet vs. Willoughby Hills, 38 Ohio St. 2d 298 (1974), the court said at Page 361:

> "In each case, there must be a balancing of interests between the benefits that would flow to the owner of the property if his proposed use were allowed and the benefit to the public health, safety, welfare and morals that derived from the existing zoning. Curtis vs. Cleveland, 170 Ohio St. 127 (1959)."

In balancing the interests of the property owner and the benefit to the public health, safety and welfare derived from the existing zoning, the scales are heavily weighted in favor of the public. It is so stated in a multitude of cases. Typical of these court pronouncements is that of Judge Cook of the 11th Appellate Court of Appeals in the case of Site and Tract Real Estate Co. vs. Edson A. Hill, Case No. 4-241 (1973), which was concurred in by all

three judges, at Page 6:

> "It is firmly established that courts must always indulge a strong presumption in favor of the constitutionality of legislation (American Cancer Society v. Dayton, 160 OS 114; State ex rel Dickman v. Defenbacher, 164 OS 142).
>
> "The general presumption in favor of the constitutionality of legislation applies not only to acts of the legislature, but also to the action of all lawmaking bodies which are legally constituted and thus to municipal ordinances (Leis v. Cleveland R. Co. 101 OS 162; Xeniea v. Schmidt, 101 OS 437; Invest. Co. v. Cutler, 125 OS 12; Renker v. Brooklyn, 139 OS 484; American Cancer Soc. v. Dayton, 160 OS 114)."

The factual situation briefly is as follows: Mr. Amsdell acquired three lots, aggregating in area slightly over an acre, facing on the west side of S.R. 306 after the State acquired title to the front portion of the lots for the construction of a ramp on S.R. 306 to take southbound traffic on S.R. 306 onto S.R. 2, Lake-

land Freeway, westbound. The ramp as it meets the Freeway is filled to some 10 or 12 feet above the level of the lots. Plaintiffs desire to haul in a large amount of fill dirt to bring the level of the property up to the level of the ramp and construct thereon a gasoline service station with limited mechanical service. The raised portion will be improved with blacktop around the station, a station some 14 feet high will be constructed with three pump islands, an advertising sign erected somewhat higher and necessary lighting installed for such a station. Plaintiff claims that his plan will take care of the accelerated run off of water without harm to lower owners, but this is questioned by the City. Exxon, after making traffic counts, estimates that in a month they will service 6,000 cars and that this

amount of traffic in and out of its station will not interfere with the flow of traffic going onto S.R. 2.

As against this use, Exxon claims that the land cannot be used for the construction of one family homes for many reasons, including the economic feasibility of building ramps from the homes up onto the level of the ramp and the unsafe situation caused by turning from a steep ramp onto a heavily traveled road. Exxon's expert witness, Robert Van Curen, testified that for building homes, the land had no value and that only "an incredibly stupid developer" would consider such a development. The freeways would have an immediate depreciating effect so they would be worth less than the construction costs. However, the land might have a value of $5,000 for speculation. In his opinion the land in

question would have a value of $150,000 for a gasoline service station.

The Plaintiffs also called Mr. Jackman, who is a professional traffic engineer and consultant with excellent credentials, and in his opinion the traffic in and out of the gas station would be much less hazardous than that coming out of private homes because among other considerations traffic from the station would be on the level, whereas that from the homes would be coming up a ramp onto the ramp onto S.R. 2.

The City called four witnesses to testify to the various subjects covered by Plaintiffs, and they had diametrically opposite opinions as to all essential matters. Two of them had diagrams showing how the land could be profitably used for the construction of homes on this property. They each had a plan but

they felt there would be no great problem or expense to solve all the problems presented by opposing experts. In addition, they pointed out the adverse effect that the gas station would have on the surrounding property which is all zoned for single family homes.

Without doing an analysis of the competing opinions on the most advisable use of the property, the only point of agreement was that the property owner could realize from $100,000 to $150,000 from the sale of his property to Exxon for a gas station, as against $5,000 to $17,000 for use as permitted by the present zoning. The only reason for reviewing the possible use of the property as zoned as contrasted to that proposed by Plaintiffs is to balance the interests which would flow to the owner if its proposed use were allowed, as

against the benefit to the public health, safety, welfare and morals if kept with present zoning as required in the C. Miller Chevrolet case.

It appears to the Court that the advantage in a change of zoning on the subject parcel is almost entirely the increased profit to the owner. The evidence showed that the public is adequately served by having 37 gas stations within a 2-1/2 mile radius of the site. The Court finds it hard to believe that it is safer from a traffic safety standpoint to have 6,000 cars a month in and out of the gas station than the small amount of traffic generated by two or three private homes, even though they would have to come up an incline to the level of the street.

Again the Plaintiff contends that the property is so close to the traffic

on both heavily traveled roads no one would build a house on it. The City countered by showing numerous exhibits of allotments next both Route 2 and I-90 where homes have been built adjacent to said roads. Plaintiff further contends that the State Highway Department never chose to purchase the ingress-egress rights to any of this land and if it is landlocked it is valueless. In 1959 when the Highway Department acquired the front of these lots with the houses on them, they must also have compensated the owners for the damage to the residue. If the owners could demonstrate that this residue could not be used with its existing zoning, proper compensation would have been paid for this damage. Certainly Mr. Amsdell being a sophisticated investor would be aware of this when he acquired the lots.

He is not what Mr. Van Curren referred to "an incredibly stupid developer."

As against the advisability of the zoning change, the witnesses for the City point out the fact that the zoning on the north side of S. R. 2 from N. Center Street (#615) in Mentor to Lost Nation Road on the west, a distance of about two miles in each direction, is entirely either single or multifamily residential. This belt extends northerly to just short of Lakeshore Boulevard, another distance of some two miles. This uniform plan was challenged before in the north-west quadrant of S.R. 615 by the Site and Tract case referred to above, and our Court of Appeals would not approve a change. S. R. 2 forms a buffer between this area devoted to private homes on the north and the industrial area on the south side of S. R. 2. Across S. R. 2

at this interchange the zoning is for commercial and interchange use including gas stations. The experts in planning agreed that a natural feature such as a like or valley would form a better buffer, but lacking that a State four-lane highway serves very well. Granted that much of the north area is not yet developed, but in good city planning such areas must be preserved for homes in this rapidly developing area. Some disadvantages to having a gas station in a residential area were described, such as the lights, noise, rapid run off of water, but these are minor to the idea of holding the line on the comprehensive zoning established by the City of Mentor. Once there is a hole in the dam, it will be almost impossible to prevent a flood of requested changes in zoning for other commercial projects.

The Comprehensive Plan of Mentor was prepared by Stanley & Associates, a consulting firm, together with officials of the City after a great many public meetings to get public imput in 1967, and was adopted in 1968 by the City Council. The Plan was reviewed in 1973 by a committee appointed by the City Council with the assistance of the City Planning Department. No change was made as to the subject parcel or any land in this area to permit commercial use. The Comprehensive Plan has been challenged in court several times, but to date the courts have sustained the wisdom of the City in refusing to make exceptions.

Are the scales sufficiently balanced in favor of the Plaintiffs to require a decision in their favor? After considering the above testimony and much more not mentioned, the decision must

depend on the rules of law as developed by the many decisions of the courts on the subject.

Many courts in considering this problem have rested their decision on the premise that if the facts present a fairly debatable issue, the refusal to grant the plaintiff's prayer is not a violation of his constitutional rights. Mobile Oil Corp. vs. City of Rocky River, 48 Ohio St. 2d 23 (1974), at Page 30, quoted the trial court with approval as follows:

> "The wisdom of whether the comprehensive zoning ordinance of Rocky River should permit the installation of a gasoline station at the Southeast corner of Sprucer and Center Ridge Road is, at most, under the facts presented herein, a fairly debatable one and it cannot be seriously contended here that its action ... to be in violation of constitutional rights."

The basic facts situation in the

above case is very close to the one we have here, the chief difference being the spread of values with and without allowing the zoning change.

> Willott vs. Beachwood, 175 Ohio St. 557 (1964):
>
> "...The legislative, not the judicial, authority is charged with duty of determining the wisdom of zoning regulations, and the judicial judgment is not to be substituted for legislative judgment in any case in which the issue or matter is fairly debatable.

To the same effect are the following cases:

> Curtis vs. Cleveland, 166 Ohio St. 509 (1957)
> Cleveland Trust Co. vs. Brooklyn, 92 Ohio App. 351 (1952)
> Partain vs. City of Brooklyn, 101 Ohio App. 279 (1956)
> Flare Corp. vs. Brecksville, 49 Ohio App. 2d 77 (1976)
> 8 McQuillin, Municipal Corp. 120, 696, Sec. 25.55 and 25.281
> 58 Ohio Jur. 2d, Page 510, Sec. 37

Another test is whether or not the existing zoning has no relation to the public health, safety, morals and welfare.

The cases cited above also include a discussion of this proposition. The Willott vs. Beachwood case (supra) in the body of the opinion, makes this statement:

> "Where such judgment deals with the control of traffic, volume of traffic, burden of traffic, effect upon valuation of property, municipal revenue to be produced for the city, expense of the improvement, land use consistent with the general welfare and development of the community as a whole, or, in short, where the judgment is concerned with what is beneficial or detrimental to good community planning, it is in the first instance a legislative, not a judicial, matter."

While a gasoline service station located on Plaintiffs' parcel probably would not have a devastating effect on the community, it would have an adverse effect on traffic safety and a more adverse effect on the development of the community as a whole.

The development of the community as a whole is another consideration which the courts weigh in their conclusions. In the C. Miller Chevrolet case (supra) referred to at the first of this opinion, this proposition is discussed. In that case it appears that the Plaintiff had a stronger position than the Plaintiffs do here and there the ordinance was sustained.

Again, the courts have said time after time that the court should not substitute its judgment for that of the legislative authority except in the absence of a showing that such power has been exercised in such an arbitrary, confiscatory and unreasonable manner as to be in violation of constitutional guaranties. As was said in the Willett vs. Beachwood case (supra):

> "Municipal governing bodies are better qualified, because

> of their knowledge of the situation, to act upon these matters than are the courts."

The City of Mentor adopted a plan for the future development of the City after careful study and with the assistance of the best professional city planners it could obtain, and the plan was reviewed and brought up to date after a five year trial in which it set aside certain areas for industry, commerce and residential development, and such plan does not seem to be arbitrary or confiscatory. It may create a limit on the profitability of Plaintiffs' land, but it is not confiscatory.

Finally, the Plaintiff is in a poor position to complain since he acquired the property knowing at the time that it was zoned for single family residences. In the unreported case of Mintz, et al vs. Village of Pepper Pike, et al, Case

No. 38256, Court of Appeals, Eighth District, the court considered this factor. At Page 16 of its opinion, it stated:

> "Although the Supreme Court of Ohio has not discussed this factor in its zoning decisions, we find that the highest courts of other states share the view that where land is purchased in one zoning classification with the hope of changing its classification to a more profitable one, the failure to obtain the change cannot be urged against the validity of the ordinance."

Cited in support of the above statement are:

> City of Howell vs. Caal, 341 Mich. 585 (1954)
> Howard vs. Roseville, 344 Min. 343 (1955)
> Cities Service Oil Co. vs. County of Lake, 26 Ill. 2d 176
> Vedovill vs. City of Northlake, 22 Ill. 2d 611.

It is the opinion of the Court that the Plaintiffs in the instant case have failed to produce evidence sufficient

to justify the Court in granting the relief prayed for. They were faced with a very difficult task of meeting all of the challenges set up by the decision of the courts of Ohio and other states and have fallen far short of meeting the challenge.

Attorneys for the City of Mentor may draw a journal accordingly and submit the same for approval to counsel for Plaintiffs, dismissing their complaint at Plaintiffs' cost.

/s/ J. Frank Pollock
J. Frank Pollock, Judge
Sitting by Assignment of
The Supreme Court of Ohio

Copies:

David P. Freed, Esq.
Donaldson, Colgrove, Cardinal & Freed

Daniel F. Richards, Esq.
Assistant Law Director
City of Mentor

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,)
)
City of Columbus.)

Exxon Corp. et al.,)
)
Appellants,)
)
vs.)
)
City of Mentor,)
)
Appellee.)

1980 TERM

To wit: May 1, 1980

No. 80-268

APPEAL FROM THE COURT OF APPEALS

for LAKE County

This cause, here on appeal as of right from the Court of Appeals for LAKE County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for LAKE County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the
seal of the Court
this 16th day of June 1980

THOMAS L. STARTZMAN Clerk

/s/ Sam F. Adkins Deputy

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,)
)
City of Columbus.)

Exxon Corp. et al.,)
)
Appellants,)
)
vs.)
)
City of Mentor,)
)
Appellee.)

1980 TERM

To wit: May 1, 1980

No. 80-268

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

for LAKE County

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00 paid by Robert J. Amsdell.

I, Thomas L. Startzman, Clerk of the

Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the
seal of the Court
this 16th day of June 1980

THOMAS L. STARTZMAN Clerk

/s/ Sam F. Adkins Deputy

IN THE COURT OF APPEALS
LAKE COUNTY, OHIO
ELEVENTH APPELLATE DISTRICT

EXXON CORPORATION and ROBERT J. AMSDELL

Appellants

-vs-

CITY OF MENTOR, OHIO

Appellee

FILED
COURT OF APPEALS
JUL 15 1980
ANDY J. TOTIN
CLERK OF COURT
LAKE COUNTY, OHIO

Case No. 7-065

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Robert J. Amsdell and Exxon Corporation, the Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals for the Eleventh Appellate District of the State of Ohio affirming the judgment of the Court of Common Pleas of Lake County, Ohio, in this action, which final judgment was entered in this action on December 26, 1979, and over

which judgment the Supreme Court of the State of Ohio refused to exercise discretionary review on May 1, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ David P. Freed
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216-352-3375

/s/ Thomas A. Kondzer
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Counsel for Appellants
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Cleveland, Ohio 44114
216-781-5252

PROOF OF SERVICE

I, David P. Freed, a member of the Bar of the Supreme Court of the United States and counsel of record for Robert J. Amsdell and Exxon Corporation, Appellants herein, hereby certify that on the 16th day of July, 1980, I served three copies of the foregoing Notice of

Appeal on each of the parties herein as follows:

On Appellee City of Mentor, Ohio, by mail, by depositing copies of the Notice of Appeal in a United States post office mailbox in Painesville, Ohio, with first class postage prepaid addressed to Daniel F. Richards, counsel of record for Appellee, at 38052 Euclid Avenue, Willoughby, Ohio 44094.

On Appellee City of Mentor, Ohio, by mail, by depositing copies of the Notice of Appeal in a United States post office mailbox in Painesville, Ohio, with first class postage prepaid addressed to I. James Hackenberg, counsel of record for Appellee, at 420 Lakeshore Trust Building, Painesville, Ohio 44077.

I further certify that all parties required to be served have been served.

/s/ David P. Freed
DAVID P. FREED
Counsel for Appellants

Dated: July 16, 1980

Supreme Court, U. S.
FILED
OCT 14 1980
MICHAEL RODAK, JR., CLERK

No. 80-318

In the Supreme Court of the United States

October Term, 1980

EXXON CORPORATION, *et al.*,
Appellants,

vs.

CITY OF MENTOR, OHIO,
Appellee.

ON APPEAL FROM THE OHIO COURT OF APPEALS
FOR THE ELEVENTH DISTRICT

MOTION TO DISMISS

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No. 80-318

In the Supreme Court of the United States

October Term, 1980

EXXON CORPORATION, *et al.*,
Appellants,

vs.

CITY OF MENTOR, OHIO,
Appellee.

ON APPEAL FROM THE OHIO COURT OF APPEALS
FOR THE ELEVENTH DISTRICT

MOTION TO DISMISS

Pursuant to Rule 16.1 (b) of the Rules of the United States Supreme Court, appellee moves this Court for an order dismissing the present appeal from the Ohio Court of Appeals, Eleventh Appellate District, for the reasons that the appeal does not present a substantial federal question and the judgments of the state courts below rest on an adequate non-federal basis.

BRIEF IN SUPPORT OF MOTION TO DISMISS

In their Jurisdictional Statement, the appellants have presented for this Court's consideration a question which is wholly unsupported by the record.

Underlying all of the appellants' arguments and conclusions is the major premise that the appellant property

owner, Robert J. Amsdell (hereinafter, appellant Amsdell), is deprived of absolutely all economic use of his property by the zoning ordinance in question. As a corollary, appellants have also represented to this Court that the trial court's sole consideration in denying appellants' petition was to maintain the integrity of the appellee's comprehensive zoning plan. The record and the judgment of the trial court give no support to either of those propositions. The question presented by the appellants, and their supporting arguments, all assume a statement of facts from evidence as construed most favorably to the appellants and not as found by the trial court or otherwise supported by the record.

At the crux of the Jurisdictional Statement is appellants' argument that the operation of the Mentor zoning ordinance at issue results in a total, complete deprivation of absolutely all economic use of the subject property. Indeed, that proposition is embodied in the appellants' statement of the questions presented for review by this Court wherein appellants claim that the ordinance "prohibits . . . any economic use" of the property. Jurisdictional Statement (hereinafter cited as Jur. St.), 1. *Cf.*, Jur. St. at 15, 17, 18, 19, 23, 26, 27, 28, 29, 31 and 35.

The premise that this ordinance constitutes a total deprivation of all economic use of the property is in sharp contrast to the evidence elicited at trial and as effectively found as fact by the trial court in its opinion. In similar contrast is appellants' contention that the sole justification for the trial court's denying their requested use of the property as a gasoline service station rather than for residential purposes, as presently zoned, is a desire to maintain the integrity of appellee's comprehensive zoning plan. Jur. St., A-16 through A-19. Rather than directly confront the factual conflict on this appeal, the appellants have, at least for purposes of the Jurisdictional Statement, cava-

lierly assumed as fact their most favorable statement of the evidence as if the trial court had wholly adopted the testimony of appellants' witnesses while entirely disregarding testimony elicited by appellee. To the contrary, the trial court was quite specific in weighing all of the evidence and in reaching its various conclusions. Jur. St., A-13 *et seq.*

Even a casual reading of the trial court's opinion, reproduced in the Jurisdictional Statement at A-13 *et seq.*, discloses the acute factual discrepancies before the trial court and the court's findings. The trial court carefully detailed the testimony offered by all parties regarding development of the property as a gasoline service station rather than residential property vis-a-vis such varied questions as terrain (Jur. St., A-18), drainage (Jur. St., A-19), traffic impact and safety (Jur. St., A-19, A-23, and A-30), economic profit from development (Jur. St., A-20, A-21, A-23, and A-32), and the zoning and development of contiguous and surrounding property (Jur. St., A-23 through A-26).

Against this background of countervailing evidence offered as to all of these issues, the trial court noted that the witnesses called by the appellants and those called by the appellee ". . . had diametrically opposite opinions as to all essential matters." Jur. St., A-21. The trial court found only one area of agreement in the evidence and that was in the fair market values of the property if developed as residential property or as a gasoline service station. Jur. St., A-21.

Appellants' contention that the property is devoid of any economic value unless used as a gasoline service station is simply erroneous. The trial court noted that there was testimony from two of appellee's witnesses detailing diagrams of profitable residential construction on appellants'

property. Jur. St., A-21. The trial court also commented on evidence in the form of "numerous exhibits" showing residential development of similarly situated property. Jur. St., A-23 and A-24. There was substantial evidence that this property can be developed as residential property and it does have appreciable economic value as residential property; or, at least, so the trial court concluded.

Appellants have noted that a zoning regulation must serve a legitimate state interest and must leave the property owner "some economic use" of the property, citing *Euclid v. Ambler Realty*, 272 U.S. 365 (1926), and *Penn Central Transportation v. New York*, 438 U.S. 104 (1978). Jur. St., 21 and 22. The trial court did in fact find that a legitimate state interest was served by the zoning regulation and that the appellants' property has some economic value as residential property and is not economically valueless as appellants have argued to this Court. Jur. St., A-28 and A-32.

That this same property may have a greater economic value when zoned for a gasoline service station is hardly dispositive of the issues. The balancing of public and private interests involved in zoning legislation was implicitly recognized by this Court at least as early as the seminal case, *Euclid v. Ambler Realty, supra.*

In the case at bar, the trial court found ". . . that the advantage in a change of zoning on the subject parcel is almost entirely the increased profit to the owner." Jur. St., A-23. The court below did not find any advantage whatever to the public. To the contrary, while acknowledging the increased traffic hazard from a gasoline service station on this property, the court also found the surrounding area to be "adequately served" by having thirty-seven gasoline stations within a two and one-half mile radius of the subject property. Jur. St., A-23.

The trial court also found it noteworthy that appellant Amsdell is a "sophisticated investor" who purchased the property well after the enactment of the zoning ordinace in question and with full awareness of the existing residential zoning. Jur. St., A-24. Appellant Amsdell purchased this property zoned as residential with the hope of obtaining the necessary change of zoning to allow the construction of a gasoline service station and resulting in the corresponding profit. *Cf.*, Jur. St., A-22. Appellants now claim that it is unconstitutionally confiscatory not to allow their speculative scheme to realize consummate fruition. The Constitution certainly does not guarantee anyone a profit nor does it prohibit a loss from speculative investment.

The record below discloses very distinct factual issues and conflicts in testimony which were resolved by the trial court in its judgment and the supporting opinion. On appeal to the Ohio Court of Appeals, Eleventh Appellate District, the appellants sought reversal on the ground, *inter alia*, that ". . . the trial court's decision [was] contrary to the weight of the evidence . . ." Jur. St., A-7. The Ohio Court of Appeals reviewed the evidence, found it sufficient to sustain the judgment of the trial court, and affirmed the judgment below. Jur. St., A-8 and A-3. Appellants' argument in the Jurisdictional Statement implicitly quarrels with the trial court's findings of fact, assuming facts and drawing conclusions from facts which the trial court did not find.

Perhaps inadvertently, the appellants explicitly reach the gravamen of their argument in the Jurisdictional Statement at A-31:

> "*The Ohio Courts . . . ignored the evidence* that the ordinance rendered Appellants' property useless *and*

> *refused to consider* the ordinance's harsh economic impact on an Appellants' particular parcel of property." (Emphasis supplied).

Jur. St., A-31. Aside from the fact that this argument is substantively untrue, it does serve the purpose of illustrating that, despite appellants' attempts to couch this appeal in constitutional terms, this case turns only on the facts.

This Court should not now delve into this factual dispute. The deference which this Court assigns to findings of fact by the courts below is palpable. A simple statement of the Court's view of weighing the evidence and making factual determinations is found in *Norton Co. v. Department of Revenue,* 340 U.S. 534 (1951):

> "Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will reexamine, as a court of first instance, findings of fact supported by substantial evidence."

340 U.S. at 538. The trial court's opinion, which is appended to the Jurisdictional Statement, intrinsically discloses substantial evidence to support its conclusions and judgment.

Although the power is certainly there for the Court to accept jurisdiction of the case at bar and to make independent factual determinations, such a result would be extremely inconsistent with prior decisions on that issue. The Court noted its usual approach to factual determinations in *Pennekamp v. Florida,* 328 U.S. 331 (1946):

> "While the ultimate power is here to ransack the record for facts in constitutional controversies, we are accustomed to adopt the result of the state court's exam-

> ination. It is the findings of the state courts on undisputed facts or the undisputed facts themselves which ordinarily furnish the basis for our appraisal of claimed violations of federal constitutional rights."

328 U.S. at 345. The record discloses facts which are anything but undisputed, the trial court's having found dispute as to "all essential matters." Jur. St., A-21.

Regarding factual review on appeal, this Court has developed the "two-court rule" pertaining to cases where the facts have been reviewed by two lower courts. A statement of the rule and its underlying policy is found in *Berenyi v. District Director*, 385 U.S. 630 (1967). The Court was asked in *Berenyi* to review and reject a factual conclusion which was reached by the trial court and which was affirmed by the appellate court. The Court refused to make the factual inquiry, noting the rule as follows:

> "In order to do so, we would be forced to disregard this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the basence of a very obvious and exceptional showing of error.' . . .
>
> The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force."

385 U.S. at 635 and 636.

In the case at bar, the trial court made findings of fact and drew conclusions from those findings. The suffi-

ciency of the evidence expressly was challenged and was affirmed by the appellate court below. The two-court rule precludes any further consideration of the evidence on this appeal.

CONCLUSION

Appellants' arguments notwithstanding, this case does not present a substantial federal question. Appellants' arguments all presuppose the existence of facts which either were not believed or were not found by the trial court. The decisions of the Ohio courts thus rest on an adequate non-federal basis and review should be denied. It would be strikingly inconsistent with the prior decisions of this Court to accept review and confront these factual issues anew.

Respectfully submitted,

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